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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1990.

GIOVANNI CASTIELLO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

I. Whether the admission of prior bad act testimony, despite pre-trial ruling excluding such evidence violated petitioner's right to a fair trial.

II. Whether absence of a clear standard upon which the sentencing can depart from the sentencing range imposed pursuant to the sentencing guidelines violated petitioner's due process rights due to improper conduct of government agent.

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PETITION FOR WRIT OF CERTIORARI.

Petitioner respectfully prays that the Court issue a writ of certiorari to the United States Court of Appeals for the First Circuit for review of the decision issued September 12, 1990.

Opinion Below.

The decision of the United States Court of Appeals for the First Circuit, entered September 12, 1990, has been reported. It is reprinted in the Appendix, pp. A1-A12, *infra*.

Constitutional Provisions, Statutes, and Rules Involved.

United States Constitution, Amendment 5 (in pertinent part):

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Federal Rules of Evidence, Rule 404(b):

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Jurisdiction.

The United States Court of Appeals for the First Circuit entered its decision and judgment on September 12, 1990 (App. A1-A12). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

Statement of the Case.

On December 12, 1988, the Grand Jury returned an indictment charging Giovanni Castiello ("petitioner") with attempting to possess, with the intent to distribute over 500 grams of cocaine, in violation of Title 21 U.S.C. § 841(a)(1), § 841(b)(1)(B) and § 846.

On December 29, 1988 petitioner filed a pre-trial Motion for Disclosure of Bad Acts (App. A22). In response to Petitioner's Motion for Disclosure of Bad Acts, the government made representations that it did not intend to introduce any bad acts during its case in chief (App. A24). The federal magistrate (Alexander, M.) adopted the government's representations in her ruling on the motion (App. A22).

Prior to trial, the trial judge allowed the petitioner's motion *in limine* to exclude all prior bad acts during the government's case-in-chief. The District Court relied on the Government's reiteration that it did not intend to introduce evidence of prior bad acts during its case-in-chief.

On May 15, 1989 through May 18, 1989, the case was tried before a jury.

During the trial, the District Court allowed testimony by Special Agent Joseph Desmond (the "agent"), over petitioner's objections, concerning his interpretation of statements made by petitioner on an audio tape recording. The agent testified that in his opinion petitioner was in the drug business seven or eight years ago (App. A25-A30).

Petitioner moved for a mistrial, arguing that the agent's testimony was prejudicial and non-responsive (App. A25-A30).

The court denied the motion for mistrial (App. A25-A30).

Petitioner did not testify, call witnesses, nor put on any evidence following the close of the government's case-in-chief.

The jury found petitioner guilty on the one count charged in the indictment.

On August 16, 1989, petitioner appeared before the District Court for a sentencing hearing. The probation office calculated the guideline offense level at 30. This offense level carried a sentencing range of 97 to 121 months incarceration. The government agreed with the probation office's calculation. Petitioner objected to the calculation and argued that there existed mitigating circumstances that warranted a departure from level 30 (App. A30-A40).

The sentencing judge, not fully appreciative of the scope of his discretion under the United States Sentencing Guidelines, imposed sentence upon petitioner of ninety-seven (97) months in prison (App. A30-A40).

Petitioner appealed his conviction and sentence to the United States Court of Appeals for the First Circuit.

On appeal, petitioner argued that the trial court erred when it allowed the agent to testify about alleged prior bad acts over objection. Petitioner further challenged the sentence imposed, citing as error the sentencing judge's failure to appreciate his discretion to depart downward from the range imposed by the Sentencing Guidelines. Finally, petitioner argued that the penalty statute under which his sentence was imposed failed to provide sufficient notice required by due process.

The Court of Appeals affirmed the District Court on all points in its decision filed September 12, 1990 (App. A1-A12). Petitioner seeks review of this decision.

Reasons for Granting Certiorari.

The Decision Below Raises Important Federal Questions Which the Court Has Not Yet Addressed.

Petitioner seeks review of the decision of the United States Court of Appeals for the First Circuit (the "Court of Appeals") on the grounds that the decision failed to remedy several substantial violations of his due process rights both in the conduct of his federal criminal trial and in his sentencing following conviction.

This Court has not yet settled the important federal questions raised here. Because the rights violated are substantial, petitioner asserts that review is merited.

I. The Admission at Trial of Testimony Alleging Petitioner's Prior Bad Acts, Despite the Trial Courts Pre-Trial Ruling Excluding Such Evidence and the Government's Representations that It Would Not Offer Such Evidence During Its Case-in-Chief, Deprived Petitioner of a Fair Trial.

The Court of Appeals found no error in the admission of the prior bad acts testimony that petitioner argued should have been excluded under Fed.R.Evid. 404(b). Reviewing for "plain error", on the grounds that petitioner failed to raise a sufficiently specific objection at trial, the Court of Appeals found because the prior bad acts testimony was probative of petitioner's intent, it was properly admitted (App. A5-A7).

The ruling below ignores the particular circumstances of the petitioner's trial and formulates an excessively broad standard of review for admissibility under Rule 404(b).

The Court of Appeals nowhere in its decision refers to the undisputed fact that petitioner had obtained a pre-trial ruling excluding all prior bad acts evidence from the Government's case-in-chief (App. A1-A12). Neither does the decision mention that the exclusionary ruling was obtained on the basis of the Government's representations that it would not offer prior bad acts evidence during its case-in-chief. *Id.*

Furthermore, the Court of Appeals failed to properly recognize and give appropriate weight to the substantial prejudice to petitioner caused by the admission of the evidence. ignoring the second and essential step of its two-stage analysis under Rule 404(b) (stage one, determination of probative value; stage two, balancing against unfair prejudice; *citing United States* v. *Medina*, 761 F.2d 12, 15 (1st Cir. 1985).

Federal Rule of Evidence 404(b) provides, in pertinent part, that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith.

This Court recently expressed its concern about prejudicial effects of the admission of other crimes (referred to herein as "prior bad acts") evidence in *Huddleston* v. *United States*, 485 U.S. 681, 690, 108 S.Ct.1496, 99 L.Ed.2d 771, 783 (1988) (citation omitted). The *Huddleston* opinion stated that these unfair prejudice concerns are assuaged when the following four safeguards contained in the Federal Rules of Evidence are properly applied to the analysis of admissibility:

> 1) Requirement of a proper purpose (Rule 404(b));
>
> 2) Relevancy (Rule 401);
>
> 3) Balancing of probative value and prejudicial effect (Rule 403); and,

4) Proper limiting instruction (Rule 105).

Huddleston, supra at 690.

Petitioner does not dispute the relevancy of the challenged testimony, and no limiting instruction was requested at trial. (The D.C. Circuit, has held, however, that trial judge's failure to give, *sua sponte*, an instruction limiting the juries use of admitted other crimes evidence was plain error.) *See United States* v. *McClain*, 440 F.2d 241 (D.C. Cir. 1971).

The Court of Appeals fails in its analysis here to adequately safeguard against prejudice because it neither follows the proper purpose requirement nor properly considers the substantial prejudicial effect in its balancing as required. *Huddleston, supra*.

A. *No Proper Purpose Existed for the Admission of the Prior Bad Acts Evidence.*

The absence of any proper purpose for the admission of the prior bad acts evidence in this case is revealed by a careful examination of the circumstances surrounding the petitioner's motion *in limine*.

Rulings *in limine*, although not specifically provided for in the Federal Rules of Evidence, have long been recognized as appropriate practice. *See, Luce* v. *United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443, 447 n.4 (1984) (district court has inherent right to manage the course of trials) *citing, generally*, Fed.R.Evid. 103(c). *Cf., United States* v. *Oakes*, 565 F.2d 170 (1st Cir. 1977); *United States* v. *Kahn*, 472 F.2d 272 (2d. Cir.), *cert. denied*, 411 U.S. 982 (1973).

Use of *in limine* rulings to determine admissibility of evidence prior to trial has been encouraged in recent years, *See, e.g. In Re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 260 (3d Cir. 1983), but the trial judge retains

broad discretion to refrain from ruling on a criminal defendant's pre-trial motion *in limine*. *See United States* v. *Masters*, 840 F.2d 587 (8th Cir. 1988).

On the first day of petitioner's trial, the trial judge granted petitioner's motion to exclude prior bad acts evidence *in limine* when the Assistant U.S. Attorney reiterated that the Government did not intend to offer prior bad act evidence into its case-in-chief.

The Court of Appeals adopted the Government's argument, raised on appeal, that the prior bad acts evidence was admitted for the proper purposes of determining intent and, because petitioner had filed an proposed entrapment instruction, predisposition (App. A7-A8).

The representation by the Government on the first day of trial, however, clearly reveals the improper subsequent attempt to revise the facts to support the claim of "proper purpose". The Court of Appeals improperly adopted this revisionism.

Petitioner's submission of an entrapment instruction four days prior to trial failed to put predisposition at issue in the mind of the Assistant U.S. Atttorney, for he stated immediately prior to trial that the Government did not in fact intend to offer the prior bad acts testimony when exclusion was raised by petitioner's motion *in limine*. Rather than allow, the trial court to grant the motion, the logical course would have been for the Government to oppose exclusion on the "predisposition" grounds, if any legitimately existed.

Furthermore, the Government had explicitly reserved its right to offer prior bad acts evidence on cross examination and in rebuttal. Since petitioner called no witnesses, no predicate act occurred which would have created proper purpose for the introduction of this evidence.

Implicit in the Court of Appeals decision is the proposition that in order to preserve for appeal, an objection to the admissibility first brought *in limine* must be raised during trial. *See*

Freeman v. *Package Machinery Co.*, 865 F.2d 1331 (1st Cir. 1988); *United States* v. *Griffin*, 818 F.2d 97, 105 (1st Cir.), *cert. denied*, 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987).

Other circuits have expressed the contrary view. *See, e.g. American Home Assurance Co.* v. *Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985).

This case is distinguishable from all of these, however, because petitioner's motion *in limine* was granted. Petitioner has located no authority which addresses the admission of evidence over an unopposed ruling *in limine* to exclude such evidence.

Petitioner asserts, however, that the circumstances surrounding his motion *in limine* create favorable comparison to a stipulation to the exclusion of prior bad acts testimony between the parties. The motion *in limine* was premised on the Government's representations during discovery that it did not intend to offer prior bad act evidence in its case-in-chief (App. A21), and it was granted on similar representations immediately prior to trial.

A number of circuit decisions have ruled that stipulations to the admissibility of evidence in criminal cases are binding agreements upon the Government. *See United States* v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104, 107 S.Ct. 1337, 94 L.Ed.2d 187 (1987); *United States* v. *Shapiro*, 868 F.2d 1125 (9th Cir.), opinion amended and superseded on denial of rehearing, 879 F.2d 468 (9th Cir. 1989); *Blum* v. *Morgan Guaranty Trust Co.*, 709 F.2d 1463 (11th Cir. 1983).

The facts in *Shapiro* closely resemble those present here. In that case, the Government agreed prior to trial not to offer evidence of the defendant's prior conviction nor cross-examine him on it unless the defendant denied having a criminal record. *Id.* at 1127. During trial, the government did indeed cross-

examine Shapiro on the prior conviction, and the evidence was admitted over objection. *Id.* Shapiro was subsequently convicted.

On appeal, the Government argued that the prior conviction was admissible to show motive and intent. *Id.* The Ninth Circuit soundly rejected this claim, and chastised the Government for "sandbagging" Shapiro. *Id.* at 1128. It reversed the conviction and ordered the prior conviction inadmissible if Shapiro were re-tried. *Id. See, also, United States* v. *Garcia*, 519 F.2d 1343 (9th Cir. 1975); *United States* v. *Powell*, 587 F.2d 443 (9th Cir. 1978).

The *Shapiro* court stated that stipulations were binding in criminal cases, that the federal courts require federal prosecutors to "meticulously" keep their promises, and that prosecutors must maintain the bounds of propriety. *Id.* at 1127.

Although the parties in this case did not use the term "stipulation", the representations made by the Government in response to petitioner pre-trial discovery and motion *in limine* are identical to the promises made by the prosecution in *Shapiro*: "the government does not intend to introduce any evidence of other crimes or wrongs by the defendant as part of its case-in-chief" (App. A24). Strikingly similar as well is the *ex post facto* attempt by the Government on appeal to fashion a palatable "proper purpose" for the prior bad act evidence. The only significant difference between the two cases is the different treatment of such evidence by the respective appellate courts.

Although the Court has ruled on closely related issues (*See, e.g., Luce* v. *United States*, 469 U.S. 38, 83 L.Ed.2d 443 (1984) (effects of trial court rulings on motions *in limine* to exclude evidence of prior convictions based on Fed.R.Evid. 609), it has not previously examined the due process implications of the admission of prior bad acts evidence despite the allowance of an unopposed pre-trial motion *in limine* based

on Rule 404(b). The record in this case presents such an issue. Petitioner therefore submits that certiorari should be granted to review this question.

B. *The Prejudicial Effect of the Prior Bad Act Testimony Substantially Outweighed Any Probative Value.*

Federal Rule of Evidence 403 allows a court to exclude relevant evidence if the danger of unfair prejudice substantially outweighs the probative value. Evidence of prior bad acts is unjustly prejudicial when the evidence moves the jury to base its decision on something other than the established proposition in the case. *United States* v. *Currier*, 836 F.2d 11, 18 (1st Cir. 1987). The evidence must create substantial unfair prejudice not simply unfair prejudice. *Id.*

Petitioner submits that the the admission of the prior bad acts testimony resulted in two distinct and substantial forms of prejudice. The first is the prejudicial effect of the evidence itself, the second form the prejudice which resulted from the adverse effect of petitioner's reliance on the Government's representations on his preparation and execution of a successful defense.

As to the former, the substantial prejudicial nature of prior bad acts evidence has long been recognized since such evidence will "weigh too much with the jury and [will] overpersuade them to prejudge one with bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson* v. *United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948). *See*, *United States* v. *Manafzadeh*, 592 F.2d 81, 86 (2d Cir. 1979) ("the accused might be convicted because of his participation in the other crimes rather than because he is guilty beyond a reasonable doubt of the crime alleged").

Here the petitioner was charged with one count of intent to possess with intent to distribute a controlled substance arising out of a single transaction. The likelihood that the jury would be more amenable to petitioner's guilt in the charged transaction after hearing a federal agent testify that he was a longtime drug dealer is great. This is the particular type of prejudice Rules 403 and 404(b) are designed to prevent. *Manafzadeh*, *supra*.

The Court of Appeals wholly rejected petitioner's claim that his defense strategy was severely compromised by the admission of the prior bad acts evidence, relying on the argument made by the Government, discussed *supra*, that petitioner submitted an entrapment instruction and that the entrapment defense was, in any event, petitioner's only hope (App. A7-A8).

This finding ignores the ample and uncontroverted evidence of the petitioner's heavy reliance on the Government's representations, made for the first time more than five months prior to trial and reiterated on the first day of trial, that it did not intend to offer prior bad acts evidence in its case-in-chief (App. A21, A24).

Consistent with his strategy, petitioner made no opening, did not testify, and called no witnesses. Furthermore, petitioner's failure to state a specific Rule 404(b) objection at the time the prior bad acts evidence was offered, upon which the Court of Appeals bases its "plain error" review, resulted from the surprise that evidence was being offered hours after government representations and an exclusionary ruling was made. Petitioner relied in good faith on the government's representations in the development of his trial strategy and should not be prejudiced by that reliance. *United States* v. *Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974).

The Eighth Circuit has held that improperly admitted "other wrongs" evidence is not harmless error. *Courtney* v. *Sarver*, 440 F.2d 1197 (8th Cir. 1971). The D.C. Circuit has reached

a similar result. *United States* v. *Wiggins*, 509 F.2d 454 (D.C. Cir. 1975).

II. The Absence of a Clear Standard Upon Which the Sentencing Court Can Depart From the Guidelines for Valid but Unenumerated Reasons Deprives Petitioner of Due Process.

Petitioner was sentenced pursuant to 21 U.S.C. § 841(b)(1)(B) and United States Sentencing Guidelines (the "Guidelines") §§ 2D1.1(a)(3), 2D1.4(a). The U.S. Probation Department determined that petitioner's conviction carried an offense level of thirty (30) months and called for imposition of a term of imprisonment within a sentencing range of 97 to 120 months under the Guidelines. Petitioner challenged the calculation of the offense level and argued, in the alternative, that certain mitigating factors warranted a downward departure from the Guideline range.

The District Court declined to go outside the Guidelines and imposed a 97 month term upon petitioner, the shortest term within the recommended Guideline range (App. A13).

The Court of Appeals, citing its ruling in *United States* v. *Tucker*, 892 F.2d 8 (1st Cir. 1989), held that the sentencing judge was aware of his discretion to depart downward and, therefore, it was without jurisdiction to hear petitioner's appeal of the district court's refusal to impose a sentence below the Guideline range. (App. A8-A12).

After calling it "intriguing", the court below also rejected as "theoretical" petitioner's argument that the sentencing court should have departed downward because of the manipulative actions of the federal agent, stating that this "contention . . . is without evidentiary predicate." (App. A9, n.10).

Petitioner essentially argued below that the unfair, coercive, and manipulative conduct by the federal agent during an alleged drug deal, including, but not limited to, artificial deflation of the price of cocaine, and therefore inflation of quantity, which leads to higher offense level, and ultimately longer prison sentence under the Guidelines, warranted a downward departure from the Guideline range.

Petitioner asserts that the record provides substantial evidence to support this argument. The Court of Appeals made sufficient evidentiary findings to support the first part of petitioner's argument, tied to an entrapment analysis, the agent's inducement and initiation (App. A8, n.9).

The other elements of petitioner's argument are supplied by the testimony of the agent, reference to the Guidelines themselves, and the application of mathematics.

First of all, the agent testified at trial that no drugs were actually involved in the alleged crime. Furthermore, he testified that he offered petitioner a variety of inducement in order to complete the deal. In addition, the agent testified to the Grand Jury that the price of a kilogram of cocaine at the time of petitioner's charged offense was between $18,000 and $25,000 (App. A30-A40).

Relying on § 2D1.4 of the United States Sentencing Commission Guideline Manual (rev.ed. 1988), entitled "*Attempts and Conspiracies*", the probation office arrived at an offensive level, i.e. 30, based on the amount petitioner would have bought under the terms of his agreement with the agent, i.e. 4 kilograms of cocaine at $17,000 per kilogram (App. A30-A40).

Because the $17,000 per kilogram price relied on in the computation of the offense level fell below the range which the agent testified was "market price", petitioner argued that the offense level was unfair. In other words, the agreement of the Government agent to sell a controlled substance at a price sub-

stantially below what he knows to be the actual price results in an inflated quantity of that controlled substance. Since quantity is the central factor used to determine the offense level and sentencing range, such tactics can result in the imposition of much longer prison terms on persons convicted of attempt to posses with intent to distribute in violation of 21 U.S.C. § 846.

The petitioner also asserted that while the Guidelines fail to specifically address such governmental behaviour in determining the offense level and corresponding Guideline range, other provisions in the Guidelines warranted a downward departure. Specifically, petitioner argued the policy statements in § 5K2.10 (victim's wrongful conduct) and § 5K2.12 (serious coercion, blackmail, and duress) are analagous to the actions of the agent. The Guidelines, however, fail to provide sentencing judges with sufficiently explicit standards for downward departure on unenumerated, but otherwise proper grounds, encouraging the type of unfair manipulation and pre-determination of sentence. *Cf.*, *Grayned* v. *Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99 (1972).

Petitioner urges the Court to resolve the "intriguing" issue that the Court of Appeals declined to settle and establish concrete restraint on the ability of a federal agent to pre-determine a sentence or range of sentence.

This Court upheld the constitutionality of the United States Sentencing Guidelines in *Mistretta* v. *United States*, 488 U.S. 361 (1989). Now, the Court should ensure fair use and application of the Guidelines in conformance with fundamental due process.

Conclusion.

For the above and foregoing reasons, petitioner respectfully submits that the Petition For Writ of Certiorari to the United States Court of Appeals for the First Circuit be granted.

Respectfully submitted,

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Appendix.

Table of Contents.

United States Court of Appeals
For the First Circuit

No. 89-1927

UNITED STATES OF AMERICA,
Appellee,

v.

GIOVANNI CASTIELLO,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.
[Hon. David S. Nelson, U.S. District Judge]

Before
Campbell, Chief Judge,
Coffin, Senior Circuit Judge,
Cyr, Circuit Judge.

Robert W. Harrington with whom *Thomas J. Iovieno* was on brief for appellant.

Paul V. Kelly, Assistant United States Attorney, with whom *Wayne A. Budd*, United States Attorney, was on brief for the United States.

September 12, 1990

CYR, *Circuit Judge*. When he arrived at Logan Airport on the morning of November 23, 1988, defendant Castiello was right on time for the long-awaited meeting with "Joe." It was the eve of Thanksgiving and the defendant's ambitious drug distribution scheme, possessing little substance at the start, at last seemed about to take on more as Castiello surrendered $68,000 in cash to undercover agent "Joe" Desmond for four kilograms of imaginary cocaine. The fly was in the ointment all along, of course, its flight plan delayed just long enough to ensure that Castiello not sense the sting until all voluntary statements against penal interest were preserved on tape. After appellant was apprehended red-handed, he was tried, convicted, and sentenced under 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846 for attempting to possess, with intent to distribute, a Schedule II controlled substance. As there is no discernible substance to the appeal, we affirm the district court judgment.

I

The first contention advanced on appeal is that the district court erred by allowing Agent Desmond to interpret the following taped admission by the defendant: "[I] [u]sed to buy stuff off him seven or eight years ago for 35, 37, 33, 34, so you know the market changes, you know what I'm saying?"[1] After the district court overruled a defense objection,[2] Desmond

[1] The statement was made during a meeting at which the defendant dickered with Desmond over price. Defendant boasted about his previous drug dealings, as a means of inducing Desmond to reduce the "asking" price by $1,000 per kilogram. "It's going to be regular. . . . I've been in business for *ten* years." "I done some big business in my day." (emphasis added). These recorded statements closely preceded the one Desmond translated for the jury.

[2] The objection was that "the [jury has] heard the tape and they have a transcript which I think varies from some of the tapes, and now we have another version of what the tapes meant." As an additional basis, defense counsel objected that there was "nothing slangy" about Castiello's admission; "those are numbers." On appeal, Castiello does not challange the use of the tapes or the transcripts at trial.

responded, "There is one thing, other than the obvious, that by naming prices seven, eight years ago, that indicates to me obviously that the defendant was in business seven or eight years ago." Defense counsel moved for mistrial on grounds that the answer was unresponsive, improper and prejudicial. The court denied the motion for mistrial.

The defendant maintains on appeal that the taped admission interpreted by Desmond contains no drug jargon, only "plain language" that a jury would have no difficulty understanding. Therefore, defendant argues, Desmond's interpretation was not "helpful" to the jury, in the sense intended by Federal Rule of Evidence 702,[3] and constituted improper "other acts" evidence under Federal Rule of Evidence 404(b).

We review the district court's denial of the motion for mistrial under an abuse of discretion standard, *see United States* v. *Giorgi*, 840 F.2d 1022, 1036 (1st Cir. 1988); *United States* v. *Chamorro*, 687 F.2d 1, 6 (1st Cir.), *cert. denied*, 459 U.S. 1043 (1982), according considerable deference to its determination that the expert testimony would be helpful to a jury in these circumstances, *see United States* v. *Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987) ("Lay jurors cannot be expected to be familiar with the lexicon of the cocaine community.").

We conclude that the district court acted well within its discretion. As the statement intimates *in haec verba* ("you know what I'm saying?"), the vocabular form the defendant employed with Desmond was not so readily comprehensible to the layman that it could not bear elucidation by a law enforce-

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[3] Federal Rule of Evidence 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

ment agent knowledgeable in the ways of the drug world. The admission was phrased in drug world jargon. For instance, we do not think that a lay jury reasonably could be expected to know that "35, 37, 33, 34" referred to prices for a kilogram of cocaine seven or eight years earlier, much less what those prices were.[4] *See Hoffman*, 832 F.2d at 1310.

Desmond's interpretive testimony that the defendant had been in the drug business seven or eight years earlier amounted to no more than an inexorable corrollary to Castiello's taped admission that he "[u]sed to buy stuff . . . seven or eight years ago . . .." Assuming, as defendant contends, that the statement needed no interpretation, it follows that the jury already understood, from having heard that portion of the tape played previously, that the defendant was in the drug business seven or eight years ago. In that event there can have been no unfair prejudice. At most, Desmond's testimony represented a harmless reiteration of the taped statement already heard by the jury. *See, e.g., supra* note 1. Conversely, assuming, as we conclude, that the taped statement did warrant expert interpretation, there was no basis for its exclusion under Evidence Rule 702.

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[4]The point is borne out by Desmond's testimony.

> A. Beyond that, going back seven or eight years, I was employed at DEA, although not as an agent going back that far, and I recall the price of cocaine due to its limited supply in the United States and this area, due to the law of supply and demand, the prices were up that high and upwards when I came on the job, 40 and $50,000.
>
> Even in this conversation we are talking about 17, 18 thousand dollars now, and that's based on a hugh influx of cocaine and wide availability.
>
> So what the statement told me was that —
>
> Q. Was it a reference to prices?
>
> A. Yes, it was.
>
> Q. And prices in the thousand dollar range. Would that be a fair statement?
>
> A. Yes, that's correct.

Although the defendant further contends on appeal that Desmond's interpretation of the drug world jargon constituted "wrongful act" character evidence inadmissible under Evidence Rule 404(b),[5] no Rule 404(b) objection was raised at trial, as required by Evidence Rule 103(a)(1),[6] either when the recorded statements were heard by the jury or when Desmond's interpretative testimony was received in evidence.[7]

We have explained that Evidence Rule 103(a)(1) was designed to require an objecting party "to alert the trial court and the other party to the grounds of the objection so that it

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[5] Evidence Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

[6] Evidence Rule 103(a)(1) provides:

> **(a) Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and
> (1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, *stating the specific ground of objection, if the specific ground was not apparent from the context.*

Fed. R. Evid. 103(a)(1) (emphasis added).

[7] The tapes were made available to defense counsel months in advance of trial. Yet there was no objection to the playing of the tapes on the ground that they contained "wrongful act" character evidence inadmissible under Evidence Rule 404(b). So far as the record reveals, neither the prosecutor nor defense counsel considered the taped admissions as "other acts" evidence. There is no reason, therefore, that it should have been "apparent from the context" to the district court that Rule 404(b) was the "specific ground of objection" relied on by the defendant. *See* Fed. R. Evid. 103(a)(1). Similarly, we consider it extremely improbable that the jury would have treated the defendant's statements improperly. *See United States* v. *Gonzalez-Sanchez*, 825 F.2d 572, 583 n.27 (1st Cir. 1987); Fed. R. Crim. P. 52(a).

may be addressed or cured." *United States* v. *Walters*, 904 F.2d 765, 769 (1st Cir. 1990). Not only did defendant's objection not refer to Rule 404(b), or mention a ground based in the substance of Rule 404(b), it intimated no basis of objection other than Rule 702, except, conceivably, Evidence Rule 403.[8] As the objection was not sufficiently specific to alert the court that it contemplated a basis in Rule 404(b), we review for plain error. *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572, 583 n.27 (1st Cir. 1987) (where objection did not refer to Rule 404(b), held: "[w]ithout a timely objection stating the specific grounds therefor, our review is limited to plain error"); Fed. R. Evid. 103(d); Fed. R. Crim. P. 52(b).

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[8] Rule 403 permits the exclusion of relevant evidence if, among other reasons, "its probative value is substantially outweighed by the danger of unfair prejudice . . . or by consideration of . . . needless presentation of cumulative evidence." Fed. R. Evid. 403. "Unfair prejudice" connotes "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. advisory committee's note. It would be frivolous to contend tht an accurate translation of the defendant's drug world jargon intimated that the jury should decide the defendant's fate on an improper basis. Desmond's testimony was of considerable probative value, especially as to defendant's intent to distribute the cocaine he was negotiating to purchase from Desmond, and also to evidence defendant's predisposition to engage in illicit drug activity. *See Mathews* v. *United States*, 485 U.S. 58, 63 (1988) (predisposition is " 'the principal element in the defense of entrapment,' " and it "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime.") (quoting *United States* v. *Russell*, 411 U.S. 423, 433, 436 (1973)). *Accord United States* v. *Rodriguez*, 858 F.2d 809, 812 (1st Cir. 1988).

Desmond's testimony was not a "needless presentation of cumulative evidence." One function of interpretation is to transpose veiled language into clear terms. In that sense, all accurate interpretations are cumulative, but not needlessly so where the original language bears clarification.

In the circumstances of the instant case the probative value of the interpretive testimony was not "substantially outweighed" either by unfair prejudice or by needless presentation of cumulative evidence. *See* 22 C. Wright & K. Graham, *Federal Practice and Procedure*, § 5221 at 309-310 (1978) ("The phrasing of Rule 403 makes it clear that the discretion to exclude does not arise when the balance between the probative worth and the countervailing factors is debatable; there must be a significant tipping of the scales against the evidentiary worth of the proffered evidence.").

As we stated in *United States* v. *Zeuli*, 725 F.2d 813 (1st Cir. 1984):

> The most striking aspect of . . . [Evidence Rule 404(b)] is its inclusive rather than exclusionary nature: should the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403. *United States* v. *Fosher*, 568 F.2d 207, 212 (1st Cir. 1978). Moreover, the test of admissibility is committed primarily to the trial court. *United States* v. *Eatherton*, 519 F.2d 603, 611 (1st Cir. 1975).

Id. at 816 ("intent" exception to Rule 404(b) warranted admission of evidence). *See United States* v. *Mazza*, 792 F.2d 1210, 1223 (1st Cir. 1986) ("Mazza's statements to Agent Kelly (who was posing as the 'Florida source') tended to show an effort by Mazza to impress Kelly with his 'experience' in the drug trade and thereby to encourage Kelly to go ahead with the transaction. Thus, Mazza's remarks were probative of his intent . . . ."), *cert. denied*, 479 U.S. 1086 (1987). *See supra* note 1. *See also United States* v. *Medina*, 761 F.2d 12, 15 (1st Cir. 1985) (two step application of Rule 404(b): first, determine whether the evidence has "special" probative value, *i.e.*, shows "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistkae or accident;" second, balance its probative value against any unfair prejudice). Like the statement itself, Desmond's translation was probative of defendant's "intent." *See* Fed. R. Evid. 404(b). There was no error in its admission in evidence.

II

The second contention is that Desmond's interpretive testimony preordained a reluctant decision to employ an entrapment

defense. The record belies Castiello's claim. Five months before trial the tape recordings of the incriminating admissions were made available to defense counsel, who submitted a proposed entrapment instruction prior to trial. The record demonstrates that entrapment offered whatever prospect remained for mounting a successful defense afer the jury heard the defendant's damning admissions on tape. We are unimpressed with the claim that Castiello was forced to resort to an entrapment defense in order to counter Desmond's *interpretation* of the admission that Castiello had been in the drug business seven or eight years earlier, particularly since that admission was made *after* defendant's uninterpreted admission that he had "been in business for *ten* years."[9]

III

Castiello asserts that the sentence imposed under the Sentencing Guidelines should be set aside on the ground that the district court was unaware that the Sentencing Guidelines permit downward departures. *See United States* v. *Tucker*, 892 F.2d 8, 9 & n.2 (1st Cir. 1989) (no appeal from denial of request

[9]On the other hand, the recorded conversations themselves may well have counselled recourse to an entrapment defense. The threshold a criminal defendant must surmount in order to earn an entrapment instruction was satisfied, if at all, before the challenged interpretation ever came into evidence; that is, when the recorded admissions themselves were allowed in evidence without objection. *See Mathews*, 485 U.S. at 62 (defendant "entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment"). The taped conversations revealed that Agent Desmond initiated contact with Castiello. Desmond expressed interest in supplying Castiello with cocaine on a regular basis. Desmond offered defendant certain inducements to buy cocaine, including a reasonable price and a guarantee of quality. Thus, Castiello's predisposition, or lack thereof, was at issue. *See also supra* note 1.

to depart downward under Sentencing Guidelines, unless district court unaware of discretion to depart).[10]

The sentencing judge was aware that a sentence of imprisonment below the sentencing guideline range may be imposed without contravening the Sentencing Guidelines. At the sentencing hearing, defense counsel requested "a downward departure as the Court is entitled to do . . .." Defense counsel volunteered that "there are a number of cases which suggest that there is still discretion, as Your Honor knows, under specific provisions of the Guidelines." The court expressed its intention to consider a downward departure only after evaluating the relevant facts and "to what extent there is any liability to exercise . . . 'discretion' . . . ." The judge stated that he

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[10] The only plausible basis advanced in support of a downward departure is an intriguing one. The defendant says that the undercover agent offered to sell cocaine at such low prices that the district court should depart below the guideline sentencing range as a deterrent to police manipulation of the applicable offense level through artificial inflation of the volume of controlled substance involved in the crime of conviction. Otherwise, the defendant argues, the police will lower the "asking" price for cocaine in order to leverage the volume a reverse sting target would agree to buy, thus activating higher offense levels requiring longer prison sentences. Aside from the apparent intrinsic disincentives to official manipulation of the sentencing guideline offense levels (*e.g.*, police desire to avoid exposing reverse sting operation; avoid enhancement of entrapment defense), the primary problem with the defendant's contention is that it is without an evidentiary predicate.

The uncontroverted evidence reveals that the defendant, from the start, was interested in purchasing far more than 500 grams of cocaine. The smallest quantity defendant ever mentioned was "kilograms." On one occasion Castiello said, "I don't want to work with two or three pieces [kilograms of cocaine], you understand?" Instead, Castiello suggested that he could buy ten kilograms of cocaine a month. When Agent Desmond said, "[T]here's just too much credit involved . . .," Castiello replied, "No, bring . . . four [kilograms of cocaine] and I'll pay you the whole thing — what can I tell you?"

The statute under which Castiello was sentenced, 21 U.S.C. § 841(b)(1)(B), and the Sentencing Guidelines U.S.S.G. §§ 2D1.1(a)(3), 2D1.4(a), were activated at 500 grams and 3.5 kilograms of cocaine, respectively, 21 U.S.C. § 841(b)(1)(B); U.S.S.G. §§ 2D1.1(a)(3), 2D1.1(c)(7), 2D1.4(a), both well below the ten kilogram quantity Castiello offered to buy from Desmond. We therefore refuse more definitive treatment of the theoretical concerns Castiello advances on appeal.

would determine the requirements of the sentencing guideline "mechanics" before determining "what, if any, level of discretion . . . is available." Although aware of the discretionary power to depart downward from the sentencing range, the district court elected to impose the minimum sentence within the guideline sentencing range. Thus, the record reveals that the court considered, and expressly rejected, a downward departure in the present case.[11]

We therefore are without jurisdiction to entertain defendant's challenge to the district court's refusal to depart downward under the Sentencing Guidelines. *Tucker*, 892 F.2d at 9 n.2.

IV

The final contention on appeal is that the sentencing judge should have considered that 21 U.S.C. § 841(b)(1)(B) did not accord requisite due process notice of the criminal penalties for violating section 841(a)(1). Castiello relies on *United States* v. *Colon-Ortiz*, 866 F.2d 6 (1st Cir.), *cert. denied*, 109 S.Ct. 1966 (1989), in which the defendant argued that section 841(b)(1)(B) "violates due process by imposing two inconsistent penalty schemes, one allowing the court to impose merely a fine and the other requiring the imposition of a five-year minimum term of imprisonment." *Id.* at 8.[12] The defendant in

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[11] The district court explained as follows: "I think in the sentence that I'm prepared to give consistent with the Guidelines, that indeed there is no undue fairness [*sic*] in this specific respect. And I appreciate that uniformity is a value to be considered . . .."

[12] A person convicted of distributing 500 grams or more of a mixture containing cocaine "shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . ., a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, United States Code, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or "both." 21 U.S.C. § 841(b)(1)(B). "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein." *Id.*

Colon-Ortiz argued that "the statute should be declared unconstitutional because it fails to provide adequate notice of the contemplated penalties for a Section 841(a)(1) violation." *Id.*

We determined in *Colon-Ortiz* that the language of section 841(b)(1)(B) is internally inconisistent, that it "constitutes a notice deficiency and raises serious due process concerns." *Id.* at 9. We held, nonetheless, that there was no due process violation because the defendant "was not harmed by the [notice] deficiency." *Id.* at 10. We went on to explain that the district court, in denying the defendant's motion to dismiss in *Colon-Ortiz*, had determined tht the most lenient reading of the sentencing provision would not have helped Colon-Ortiz. *Id.*

> '[A]mbiguity requires the application of the most lenient interpretation of the sentencing provision. In this case that would mean only that the court would have had the option of the imposition of a suspended sentnece [*sic*] or probation with a fine, an option I would not have chosen anyway.' *United States* v. *Ortiz*, No. 87-297, slip op. at 2 (D. Mass. Feb. 17, 1988). Given the district court's determination that the defendant should receive some term of imprisonment, under any reading of the statute the court was required to impose the five-year minimum sentence.

Id. at 10-11. And so it is in the present case.

The Sentencing Guidelines prescribe a ninety-seven month minimum term of imprisonment for the crime of which Castiello was convicted. The district court, aware of its discretion to depart downward, decided not to do so. Thus, the district court implicitly determined that a sentence of imprisonment, rather than a fine or probation, was required in any event. Therefore, as in *Colon-Ortiz*, the effect of the sentencing decision in the present case was to assure that Castiello was occa-

sioned no harm as a result of the notice deficiency complained of on appeal.[13]

The district court judgment is affirmed.

[13] Furthermore, should there remain any question as to the appositeness of *Colon-Ortiz* in these circumstances, we note that the defendant is entitled only to "plain error" review due to the failure to raise the present issue in the district court. *See Hernandez-Hernandez* v. *United States*, 904 F.2d 758, 763 (1st Cir. 1990). In that connection, looking beyond the clear disinclination towards lenity on the part of the district court, two other considerations preclude a showing of plain error here. First, defense counsel, apparently recognizing that it was unrealistic to advocate more lenient treatment, urged the court to impose the mandatory statutory minimum term of imprisonment. Second, in *Colon-Ortiz*, 866 F.2d at 11, we determined that the proper interpretation of the statute does mandate a prison term. There was no plain error.

United States District Cour
District of Massachusetts

UNITED STATES OF AMERICA v. Giovanni Castiello (Name of Defendant)	JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT Case Number: 88-00359-01-N Robert Harrington Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)_____

☒ was found guilty on count(s) one after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21 U.S.C. 841(a)(1), 846	Attempt to Possess Cocaine with intent to distribute	One

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____, and is discharged as to such count(s).

☐ Count(s)_____(is)(are) dismissed on the motion of the United States.

☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☐ It is ordered that the defendant shall pay to the United States a assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. No.:

023-34-5682

Defendant's mailing address:

167 Chelsea St., 2nd Floor

East Boston, MA 02128

Defendant's residence address:

Same as above

August 16, 1989

Date of Imposition of Sentence

David Nelson

Signature of Judicial Officer

David S. Nelson, U.S. Dist. Judge

Name & Title of Judicial Officer

August 17, 1989

Date

Defendant: Giovanni Castiello Judgment — Page 2 of 5
Case Number: 88-00359-01-9

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 97 months.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____ .

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____

United States Marshal

By: _____

Deputy Marshal

Defendant: Giovanni Castiello Judgment — Page 3 of 5
Case Number: 88-00359-01-9

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years .

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime:
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: Giovanni Castiello Judgment — Page 5 of 5
Case Number: 88-00359-01-N

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 15,050.00 , consisting of a fine of $ 15,000.00* and a special assessment of $ 50.00 .

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

*The Court hereby suspends said fine, unless during the defendant's supervised release term, it becomes apparent that he is able to pay fine.

This sum shall be paid ☐ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA,

v. CR. NO. 88-359-N

GIOVANNI CASTIELLO

MOTION IN LIMINE WITH RESPECT TO BAD ACTS

Now comes the Defendant in the above case and moves that the Court rule that the Government may not introduce any evidence of prior bad acts in its case in chief or refer to any bad acts in its opening and assigns as reason therefor that in the course of the discovery the Government represented that it did not intend to introduce any evidence of other crimes or wrongs by the Defendant as part of its case in chief which position was adopted by the Court in ruling on the Defendant's Motion for Disclosure of Bad Acts, a copy of which is attached hereto as Exhibit A.

The Defendant,
Giovanni Castiello,
By his Attorney

_____

Robert W. Harrington
99 Summer Street
Boston, Massachusetts 02110
(617) 330-175

Dated: 5/15/89

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA,

v. CR. NO. 88-359-N

GIOVANNI CASTIELLO

MOTION FOR DISCLOSURE OF BAD ACTS

Now comes the Defendant, Giovanni Castiello, and moves that the court order the Government to disclose to the Defendant the following:

(1) The existence of any prior or subsequent bad acts or convictions of the Defendant not charged in the indictment, if any.

(2) Whether the Government intends to offer evidence of any such prior or subsequent bad acts or convictions against the Defendant during the trial of the instant indictment.

(3) The names and addresses of all witnesses intended to be called by the Government to offer such evidence.

(4) Any reports or statements of any such witnesses the Government intends to offer as evidence during the trial of the instant indictment.

The Defendant,
Giovanni Castiello,
By his Attorney

_____

Robert W. Harrington
99 Summer Street
Boston, Massachusetts 02110
(617) 330-1775

1/20/89 (Alexander, M.) in that the government does not intend to introduce bad acts in its case-in-chief, motion denied.

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA,

v. CR. NO. 88-359-N

GIOVANNI CASTIELLO

GOVERNMENT'S RESPONSE TO PRE-TRIAL MOTIONS OF GIOVANNI CASTIELLO

1. Motion for a Bill of Particulars

The government opposes this motion. A bill of particulars is granted only when necessary to inform the accused of the charge against him with sufficient precision to enable him to prepare his defense, to avoid or minimize the danger of surprise at trial, or to enable him to plead his acquittal or conviction in a manner so as to bar further prosecution for the same offense. *Wong Tai* v. *United States*, 273 U.S. 77 (1927); *United States* v. *Giese*, 597 F.2d 1170 (9th Cir.), *cert. denied*, 444 U.S. 979 (1970); *United States* v. *Hill*, 589 F.2d 1344 (8th Cir.), *cert. denied*, 442 U.S. 919 (1979); *United States* v. *Haas*, 583 F.2d 216 (5th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *United States* v. *Birmley*, 529 F.2d 103 (6th Cir. 1976).

Under the facts of this case, there is absolutely no basis for granting a bill of particulars. The defendant is already on notice, through the Indictment and pre-trial discovery, of the precise time frame of the alleged offense and the exact date, time and location at which he attempted to purchase cocaine with intent to distribute it.

9. Motion for Disclosure of Bad Acts

The government does not intend to introduce any evidence of other crimes or wrongs by the defendant as part of its case-in-chief pursuant to Fed.R.Ev. 404(b), but reserves the right to use such evidence in cross-examination or as rebuttal evidence.

10. Motion for List of Trial Witnesses

The government opposes this motion for the reasons set forth in response #4 above.

11. Motion for Early Disclosure of Jencks Act Material

The government opposes this motion on the basis of 18 U.S.C. § 3500, except to the extent that it agrees to release all Jencks Acts material at least three days before trial. Moreover, based on the disclosure of the grand jury transcripts and agent reports, this motion is moot at this time.

12. Motion for List of Grand Jury Witnesses

See response #3 above.

13. Motion for Criminal Records of Witnesses

At the time the government discloses the identity of its witnesses, it will provide records of any adult convictions and pending criminal charges against those witnesses.

14. Motion for Criminal Record of Informer

See response #13 above.

Respectfully submitted,
FRANK L. McNAMARA, JR.
United States Attorney

By: _____
ROBERT L. ULLMANN
Assistant U.S. Attorney

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getting that bleached white color there will be a gold tint to it.

The smell of gasoline would refer to possibly a lab that didn't completely furnish the process and there was some by-products left of the substance. This comes from the use of things such as diesel gasoline, ether, and hydrochloric acid which are used in the process to take the raw coca leaves, convert that into cocoa paste, and finally in the last stage in the labs usually located in Colombia, to convert it to cocaine hydrochloride, which is the substance that we import and is the cocaine.

Q. One last area that I want to ask you about, Special Agent, which appears at the top of page 7 in the transcript.

I'm referring to the sentence which under Castiello reads: "Used to buy stuff off him seven or eight years ago for 35, 37, 33, 34, so you know the market changes, you know what I'm saying."

I want to ask you, sir. At the time that statement was made, what did you understand the context of what was being said to you?

MR. HARRINGTON: Objection, your Honor. For the same reason, for an additional reason, I mean that's nothing slangy about that, those are numbers. Why should this witness be allowed to testify what the other speaker meant when he said this?

[127] THE COURT: You may have it.

A. There is one thing, other than the obvious, that by naming prices seven, eight years ago, that indicates to me obviously that the defendant was in business seven or eight years ago. Beyond that —

MR. HARRINGTON: Objection. May I approach the bench?

THE COURT: What's the general objection?

MR. HARRINGTON: I would like to make a motion.

THE COURT: Okay. I'll reserve your motion. I'll deny it now. I'll deal with your motion.

A. Beyond that, going back seven or eight years, I was employed at DEA, although not as an agent going back that far, and I recall the price of cocaine due to its limited supply in the United States and this area, due to the law of supply and demand, the prices were up that high and upwards when I came on the job, 40 and $50,000.

Even in this conversation we are talking about 17, 18 thousand dollars now, and that's based on a huge influx of cocaine and wide availability.

So what the statement told me was that —

Q. Was it a reference to prices?

A. Yes, it was.

Q. And prices in the thousand dollar range. Would that be a fair statement?

[132] Please don't discuss this case with anyone, no one at home, and not even among yourselves. And if you see anything in the news media, please try to avoid it. If you are unable to avoid it then please make sure that we are aware of it so we can take whatever steps may be necessary. So if you come back tomorrow at two o'clock we'll start to start then. If you have any difficulties please let us know, and we'll try to deal with them.

Thank you very much.

[at 4:30 p.m. the Jury left the courtroom.]

THE COURT: So now what?

MR. HARRINGTON: Yes, your Honor.

Over objection the witness was permitted to testify as to his interpretation of a statement that appears on page 7 of Exhibit 2-A. In the course of his answer over objection he testified as to the conversation which he understood or told him that the defendant had been in the business seven or eight years ago. I think that was improper and I think it's tainted the

trial and I would ask the Court to declare a mistrial based upon that statement.

Secondly, your Honor, and —

THE COURT: Let me just stop you there. I don't understand you at all. I don't understand what the problem is.

MR. HARRINGTON: Well, your Honor —

[133] THE COURT: Once more now, with a little more clarification.

MR. HARRINGTON: All right. There's a statement on page 7 of Exhibit 2-A.

THE COURT: Of the transcript?

MR. HARRINGTON: Yes.

THE COURT: Let me just get it.

THE COURT: Now, which page of the transcript?

MR. HARRINGTON: Page 7, the second line that begins Castiello.

THE COURT: Yes.

MR. HARRINGTON: Mr. Kelly's question related to the statement: Used to buy stuff off him seven or eight years ago for 35, 37, 33, 34, you know the market changes, you know what I'm saying?

And over my objection the witness was permitted to testify but went beyond that and stated in effect that the defendant had been in business seven or eight years ago. I think that statement, your Honor, was unresponsive, improper, and, you know, prejudiced the case.

THE COURT: I'm sorry. I'm really being thick about it. I may be overtired.

We are now talking about 7, that page starts out by the agent's comment: He was doing better than 18. That surprises me at the time.

[134] Now, Castiello's response: Well, at the time it was different prices, you know what I'm saying. Used to buy stuff off him seven, eight years ago for 35, 37, 33, 34, so you

know, the market changes, you know what I'm saying. I heard stories like, you know, the stuff is going for 13, 14, you know.

So, what's the problem?

MR. HARRINGTON: What you said, your Honor, that based upon that he said that the defendant was in the business seven or eight years ago.

First of all, that's a conclusion, okay, it's not an interpretation about anything that's in there that's slang. I mean it's an intrusion upon the fact finding function of the jury, and it's just, you know, I think it's a basis for a mistrial.

Beyond that he testified —

THE COURT: I'm lost. I'm absolutely gonzo. And I attribute it to my ignorance.

MR. KELLY: Your Honor, one thing that is relative is at the bottom of the previous page.

THE COURT: But even so, without going to that. What I don't understand is all he did is reciting something in here, a conversation.

MR. HARRINGTON: Right.

THE COURT: In this transcript.

[135] MR. HARRINGTON: Right.

THE COURT: Not orally.

MR. HARRINGTON: No. The question from Mr. Kelly to the witness was, you know, What does that mean?

THE COURT: What does it mean, what Castiello said?

MR. HARRINGTON: Yes.

THE COURT: And?

MR. HARRINGTON: And first of all, your Honor, aside from the fact that the agent wasn't even with the agency seven or eight years ago, as he already testified, he was permitted to testify as to what that meant seven or eight years ago.

THE COURT: What difference does that make? I can translate what the Greeks said back in 401.

MR. HARRINGTON: The difference, your Honor, is that he was permitted based on this conversation to make a con-

clusion that the defendant was in business seven or eight years ago. I mean that's what they are supposed to find out. He shouldn't be permitted to do that.

THE COURT: I take it that he's not necessarily just relying upon this statement.

MR. HARRINGTON: That was the question, the only question, I mean.

THE COURT: What is your response?

MR. KELLY: My response is that the response by the **[136]** witness was perfectly appropriate, particularly, number one, the statement —

THE COURT: What is the basis?

MR. KELLY: My question was something to the effect —

THE COURT: What was the basis for his answer to that?

MR. KELLY: I think, number one, the statement on its face, "I used to buy stuff from him seven or eight years ago" would lend itself to a commonsense interpretation that someone was in some business seven or eight years ago.

But, more importantly, on the bottom of the previous page there is a statement about two thirds of the way down: "I have been doing business for ten years. I've done some big business in my day." The fact that the witness says I understood that to mean, first, that he had been in this business for seven or eight years; and, second, that that was the price of cocaine back then, I think was an appropriate response. I see no prejudice whatsoever.

MR. HARRINGTON: Well, your Honor, that wasn't the question before the witness. And what he's basically being permitted to do is to argue, make a closing statement to the jury based upon summarizing the statements, taking what was in someone else's mind when he made the statement and saying that based on that he's been in the business for seven or **[137]** eight years. And that's wrong.

THE COURT: Okay. The objection is overruled.

MR. HARRINGTON: All right. And would you note that I move for a mistrial, your Honor, on that basis?

THE COURT: Denied.

MR. HARRINGTON: And note my objection.

THE COURT: Note that I said it three times. Denied, denied, denied.

MR. HARRINGTON: Okay.

THE CLERK: All rise. Court is now adjourned.

[Court adjourned at 4:28 p.m. on May 15th, 1989 to May 16th, 1989 at 2:00 p.m.]

. . . . . .

[7] Honor. He was convicted. But I say that he is to be sentenced based upon simply an attempt to possess with an intent to distribute and no amount should be considered by the Court in imposing sentencing. I filed an objection to the pre-sentence report on that specific —

THE COURT: So, the very first thing indicates — let's go back to the — I want to have my notes right in front of me. What is it that he pleaded guilty to?

MR. HARRINGTON: He did not — he went to trial, Your Honor, and was convicted by a jury on attempt to possess —

THE COURT: Right.

MR. HARRINGTON: — with intent to distribute.

THE COURT: Sorry.

MR. HARRINGTON: But the evidence at the trial, Your Honor, indicated, first of all, that there was no actual transaction that took place; that there was an initial approach by the undercover DEA agent who suggested amounts, who suggested prices, who suggested prices at less than market, who, in effect, manipulated the situation such that they can

practically pre-determine the sentence. And for that reason, I say, Your Honor, the Court should either, in the first instance, not consider that as an amount under the Sentencing Guidelines or, alternatively, do a downward departure as the Court is **[8]** entitled to do based upon the fact that this is a mitigating circumstance what the sentencing guidelines do not —

THE COURT: You know what I don't want to do? I don't want to be confused with that. I just want to get the facts straight. And, so, what I do with it should be for another moment.

MR. HARRINGTON: Okay.

THE COURT: So that whether I give it or not, I want to know what the facts are. Then I would want to know to what extent there is any ability to exercise what I'll call and describe as "discretion" in terms of calculating all of this in applying the appropriate sentence.

I must tell you right from the beginning, this thing is a very mechanical process. And, so, until I find out what the mechanics establish, I will then test out what, if any, level of discretion or whatever is available. But, right now, I'm really trying to establish what the facts are. I'm not sure how you can support what you've just said.

MR. HARRINGTON: Well, Your Honor, I've submitted — and hopefully it came down —

THE COURT: I have it right here.

MR. HARRINGTON: — a sentencing memorandum. **[9]** Yes, sir. Let me just try and state it as succinctly as I can. Okay. And this is not with respect to any discretion on any downward departure.

THE COURT: Okay.

MR. HARRINGTON: This is simply a question that because of the cases that I've cited that the Court should not consider that amount as the amount that determines the offense level. And basically, these are all facts that were testified to

before the Court at the time of the trial in May. And they would be that the Defendant's name was given to the DEA by an informant in consideration of the payment of $2,000; that the first contact was by the agent; that within the period of one week, which is all this case encompassed, there were seven telephone calls from the agent to the Defendant; that the price proposed by the agent was less than market according to his own testimony from one of the exhibits I've attached; that he offered all kinds of special deals to the Defendant, five to four, to give him one; that he exerted pressure admittedly on the stand to conclude the deal; that initially the Defendant stated he only had a certain limited amount of money and the agent pressed him to come up with more to do the deal.

What I'm saying, Your Honor, is that that is a circumstance that is entirely within the control of the **[10]** Government — of the agent. And, therefore, to consider those negotiations as an amount of a transaction to determine the offense level is wrong and improper. And what the Court should do is simply consider the crime without reference to an amount and that, therefore, there is no basis for determining the offense level of 30.

THE COURT: Can I hear any response?

MR. KELLY: Yes, Your Honor.

Your Honor, this is precisely the argument that was made and rejected before the jury at the trial of this case. It was essentially argued by the defense at trial that this is a case of manipulation, a case of entrapment, a case of a reluctant party who was not pre-disposed to commit to this crime. Frankly, Your Honor, with respect to the amount and what the facts are, in all due respect to Mr. Harrington, the facts in this case and the evidence belie his argument.

This was what is known in the law enforcement business as a reverse sting. Information comes to the attention of law enforcement that someone is actively involved in — in this case,

the cocaine trade. They approach him and immediately it's apparent that there's this readiness, this willingness to consummate a deal. In fact, the Court may recall the tapes that were played — "I've been watching, waiting, waiting for your call." I [11] mean the amount of narcotics that was involved here ultimately is, frankly, only a fraction of the amount of narcotics that were discussed by this Defendant in the courtroom. The Court may recall this Defendant's own words on the tape: "I've been involved in this business for ten years. You know, I've got 50,000 right now. I'm ready to make a move. I'm in a position to move ten kilos a month." I mean, this is not a situation where the Government manipulated anything. The amount of narcotics here — ultimately four kilos — and the price established for those four kilos, which was a total of $68,000 or $17,000 per kilo was an amount which was not dictated by the Government or manipulated by the Government. That was an amount which was dictated by the Defendant.

If I may, Your Honor, just briefly quote from a couple of the transcripts of the tapes that went into evidence that were before the jury which led them to reach the result which they did, this Defendant commencing as follows: "I've got 50 grand down. I can move pretty good. I could probably move ten kilos a week. Seventeen" — meaning $17,000 — "would be like the most I would go." Beccause that's what this fellow, Angelo, had quoted him. So, right off the bat, in the first face-to-face meeting, the figure of $17,000 is a figure not created by the United States Government, but created by the Defendant[12] himself. "I've been in this business for ten years." You know, "I've been in the business for ten years and I've done some big business in my days." He talks about the prices of cocaine several years ago. And, finally, he says this which is very, very relevant, Your Honor, in that first face-to-face meeting: "I don't want to work with two or three

pieces," pieces being an acronym for kilos. He said, "I don't want to work with two or three pieces, you understand. That's too little for me." In fact, what we had here was four kilos. This was not a fellow that wanted to go any lower than four kilos. This was a fellow that was ready to move ten kilos a month.

There are similar comments in the telephone calls between the Defendant and agent on the days leading up to the actual transaction here. Whereas, the Court may recall the Defendant, again to demonstrate his readiness and willingness, drove up to Logan Airport with a cardboard box containing $68,000 in cash. This is a fellow who was ready to consummate a drug transaction —

THE COURT: I'm sorry. How much was the amount?

MR. KELLY: $68,000 in cash in a box, which would have been four kilos at $17,000.

Now, that figure, Your Honor, as the Court heard in testimony at the trial is, in fact, consistent **[13]** with the amount of money being charged for cocaine on the street at the particular time in question. A kilo of cocaine purchased individually in this time frame sold anywhere from 18,000 to 25,000. Kilos of cocaine purchased in bulk, more than a single kilo, the price as with any item of merchandise goes down. So, when someone purchases four kilos, they get a better price than $18,000 per kilo and that is what happened in this particular case.

But, when the agent who, as the Court will recall, was posing as a drug dealer from New York who had been put in touch with the Defendant by some former acquaintance of his by the nickname of "Angel," when that agent contacted the Defendant on the telephone and discussed with him, you know, just what was gonig to be the deal here, I mean this was a Defendant who said that he was ready to go. It was 90 percent. He just needed a couple of more days to see if he could get the

rest of this money together. He didn't want to mess around with this any longer. He had waited long enough. And it was he who said, "I'm ready." It was he who set the time and place. It was he who set the amount of narcotics and he who set the price tag for that narcotics.

So, I submit to the Court that yes, there's no drugs here, but this was a reverse sting. The Guidelines **[14]** make absolutely clear in Section 2d1.5 and 1.4 under "Attempts." And this is specifically in the Narcotics section. "If a defendant is convicted of participating in an incomplete conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed. It couldn't be any clearer. The fact that it wasn't completed because it was a reverse sting doesn't change the calculation. The calculation is determined on the amount of narcotics. It would make no sense if Mr. Harrington's argument was followed. Because if in every reverse sting, the Court said, "Well, there's no drugs here, nothing was seized, so everybody gets treated the same," it doesn't make sense that a person who is attempting to purchase four grams be treated the same as a person who is attempting to purchase 400 kilos. It wouldn't make sense at all. A person should be sentenced based on the level of culpability which they are attempting to engage in. And this is a fellow who was trying to buy four kilos of cocaine and he had the cash to do it. The Probation Department is a hundred percent correct that this is an offense level 30, that this was an attempt, and that this fellow should be sentenced within the applicable Guideline range of 97 to 121 months.

[15] MR. HARRINGTON: Your Honor, may I respond briefly?

THE COURT: Just minute. I'm sorry. Go ahead.

MR. HARRINGTON: Your Honor, just a brief response. The law and arguments of each case is, to an extent,

even under the Guidelines cases, individualized sentencing. And in this particular case, what I'm saying to the Court is that it is the argument that we made to the jury and was rejected by the jury on the question of his innocence or guilt. That's absolutely true. But with respect to the sentencing, Your Honor, and the facts of this case, I submit there are ample facts to indicate that with the Government agent making the initial contact with the Government agent, I say, making the initial proposal as to price offering to give him one free — with putting the pressure on him to come up with the money and, you know, more money than he had, I mean, the difference here is — for instance, I mean, if it were a normal deal and there were a market price, say, of $25,000 a kilo, at $68,000, he's two plus kilos. That's a difference of over two-and-a-half years on the offense level in the sentencing. What I'm saying is that it permits the Government in this case to manipulate the amount of the transaction, the amount of the sentence, the length of the **[16]** sentence and pre-determine it. I think that's wrong, it's improper, it's unfair and —

THE COURT: Well, how do you determine it? Are you determining it by what his offer was?

MR. HARRINGTON: Yes, Your Honor. I mean, he can come in and — I mean, if the market is 25 a kilo, I can give you — I'll give it to you for $5,000 a kilo —

THE COURT: And, therefore, it should reflect that and not the higher amount; is that what you're saying?

MR. HARRINGTON: Yes, Your Honor.

THE COURT: So, go ahead.

MR. HARRINGTON: And I think, obviously, Mr. Kelly can argue and I can argue that there are factual disputes here and there are. Okay. But that's exactly the reason why when the facts that underlie the transaction and the sentencing are in dispute, I think there's a basis for this Court to say, you know, "I'm going to disregard the amount that was proposed by

the Government that was negotiated, that was talked about in this particular case, and just impose the sentence based upon no amount, on the basis of mandatory minimum under the statute."

THE COURT: Okay. Anything else?

MR. KELLY: No.

[17] THE COURT: Now, does the Defendant wish to say anyting?

MR. HARRINGTON: Your Honor, the only further thing that I would say is Your Honor suggested that the question of downward departure or discretion was something you didn't want to address earlier.

THE COURT: You want to be heard on it?

MR. HARRINGTON: I would, Your Honor.

THE COURT: Please.

MR. HARRINGTON: To the extent, Your Honor, that the argument I've made with respect to the offense level is either accepted or rejected by the Court, I think that there's another side to that argument. And that is essentially, although Your Honor indicated at the beginning that the sentencing has now become somewhat of a mechanical process, there are a number of cases which suggest that there is still discretion, as Your Honor knows, under specific provisions of the Guidelines.

And I would submit, Your Honor, simply that the facts and circumstances which I argued to Your Honor on the issue of what the offense level is would also afford this Court an opportunity and basis upon which to depart downward from the Guidelines if, in fact, you find the Guidelines suggested by probation are appropriate. And added to that, Your Honor, I would simply say that I have [18] submitted a pre-sentence report that deals extensively with the Defendant's family, his involvement with the family and the community, a very strong showing of support, both here today, and in written form to the Court, and I would ask the Court to consider all of those

factors in terms of a downward departure if, in fact, the Court adopts the —

THE COURT: I've read your letters and I've read the report. So I have that in mind.

MR. HARRINGTON: Thank you, Your Honor.

THE COURT: Now, does your client wish to have something?

MR. HARRINGTON: Pardon me, Your Honor?

THE COURT: Does your client wish to be heard at this point?

MR. CASTIELLO: Yes, Your Honor.

THE COURT: All right. I'll hear you.

MR. CASTIELLO: I would just like to apologize for my family and my friends. I've never had so many supporters out here. I hope that my stay — if I get to that — I will come out a better man. I thank the Court and I apologize again to everybody for all the inconveniences and all of the disruption that I've caused. And I'm sorry. And, again, I'm very, very sorry. Thank you, Your Honor.

[19] THE COURT: Anything else by the Government?

MR. KELLY: No, Your Honor.

THE COURT: All right. I take it, then, that everyone — including the Government, defense and defendant himself — has had an opportunity to be heard. I have received a report from the probation department and it is clear from the record that that matter — that the Defendant has had sufficient opportunity along with counsel to have read it and prepared, then, to respond to it. And, so, I'm prepared to sentence if there is nothing else.

I'll admit to being rather new to this new force in our jurisprudence. In fact, this is really my first Sentencing Guideline case. As a result of that, I find myself depending upon the lines and policies that are already laid down by the Guidelines rules and, respectfully, the mandate to do exactly

what is required of me and that is to adhere to those rule while still exercising my responsibilities and whatever discretion that indeed I may have and, hopefully, consistent with my conscience.

But, in any event, I'd say indeed that I have a problem with how mechanical the whole system has become and how the rules are somewhat less sensitive and much more complicated than in prior times. But that is the **[20]** right not only of Congress, but of those who support it to make such rules and I certainly am going to apply those rules exactly consistent with the understanding that I have of their meaning, hopeful that it will still be deemed effective and fair. This is, however, not to suggest that I believe that it's not possible to be fair. It certainly is. And I think in the sentence that I'm prepared to give consistent with the Guidelines, that indeed there is no undue fairness in this specific respect. And I appreciate that uniformity is a value to be considered and, so, I stay within the rules.

Thus, upon the review of all of the information afforded me and with what I expect is a correct reading of the rule, I am prepared to impose the following sentence exercising what I believe to be fair and consistent with the new Guidelines. And to the extent that I'm wrong, I shall revise my sentence accordingly or they will be revised in place of them. And, so, I accept the pre-sentence report as written and I am now prepared to sentence Mr. Castiello accordingly.

So, on Count One of this single count indictment — you can stand — I sentence you to 97 months to be incarcerated; I impose a fine of $15,000; I impose a special assessment of $50; and there is no particular restitution that I can recognize. So, there is no such **[21]** requirement. And I order that there be a period of supervised release upon the release of three years. And that's the sentence that I will impose. And as to a fine, I don't know that there's any likelihood — the fine is

$15,000. And as to the fine, I don't know that there's any ability to pay that fine. And I'll hear from the Government on this. I'm prepared to suspend the fine, but nevertheless — or to at least put it into a circumstance where I indicate that a fine can be relaxed if, in fact, there is no evidence that you would have the wherewithal to meet that fine.

MR. HARRINGTON: Your Honor, on the question of the fine, the Government has seized and has seen to forfeit $68,000 which I would ask Your Honor to consider.

THE COURT: So, suppose I just suspend the fine. Is there any problem with that?

MR. HARRINGTON: No. None, Your Honor.

MR. KELLY: If the Court is suspending it on grounds that there's inability to pay, I have no objection.

THE COURT: Well, I am taking that as that and that's what I'm going to rule.

MR. KELLY: If, on the other hand, it's —

THE COURT: In other words, yes, and it's not to back off.